



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE 17 OF 2009

NELSON MAHANGA MWITA & 11 OTHERS.....PLAINTIFFS

VERSUS

HON. W. G. MACHAGE & 17 OTHERS.....DEFENDANTS

RULING

The Plaintiffs and the Defendants are all residents of Kuria Constituency. The 1st Defendant is their member of Parliament. 1st to 14th Defendants are members of Kuria Constituency Development Fund Committee established under the provisions of **section 23** of the **Constituencies Development Fund Act No. 10 of 2003** as amended by **Act No.16 of 2007**. Prior to December 2007 this was the only constituency in Kuria District. The President of the Republic of Kenya while on campaign in the District directed that it be split into two districts, namely Kuria West District and Kuria East District. Kuria East District was to comprise Kegonga and Ntimaru divisions. The Plaintiffs are residents of the two divisions.

Kuria East District required the location of its headquarters to be identified and to be constructed to accommodate the District Commissioner and other government officials. The Plaintiffs' case is that the residents of the two divisions were to be fully and exhaustively consulted before agreement is reached with the government as to the location of the headquarters. They also claim that the construction of the headquarters was to be the responsibility of the Central Government. The position on the ground is that the district headquarters are to be set up at Kegonga Market and the Kuria Constituency Development Committee has resolved to use the funds allocated to it under the Act to finance such construction which will include the District Commissioner's Residence. 15th to 18th Defendants are members of **The Project Management Committee for the proposed Construction of District Commissioner's residence for Kuria East District**. It is the contention of the Plaintiffs that the use of such funds for the purpose indicated above is contrary to the Constituencies Development Fund Act as amended. This is why they have come to court on their own behalf and that of the other interested residents of the constituency to seek the following orders:

a) A permanent injunction restraining the Defendants either by themselves, their agents, servants or anybody claiming to act on their behalf or through them from constructing the proposed Kuria East District Commissioner's Residence at Kegonga Market or at any other place until the residents of Ntimaru and Kegonga Divisions of Kuria East District agree on a suitable place for the location of the District Headquarters.

- b) A permanent injunction restraining the Defendants either by themselves their agents, servants or anybody claiming to act on their behalf or through them from utilizing Kuria Constituency Development Funds to finance the construction of the proposed Kuria East District Headquarters or the District Commissioner's Residence.
- c) A declaration that the use or intended use of Kuria Constituency Development Fund by the Defendants to finance the construction of Kuria East District headquarters and the District Commissioner's residence is in contravention of the Constituencies Development Fund Act No.10 of 2003 as amended by Act No.16 of 2007 and is therefore wrongful, null and void.
- d) An order directing the 1st to 14th Defendants jointly and severally to pay or refund such moneys as may be found to have been unlawfully taken from the Kuria Constituency Development Fund by the Defendants to finance the construction of Kuria East District Commissioner's residence or Kuria East District headquarters.
- e) A declaration that the district headquarters for Kuria East District can only be properly decided upon after consultations and consensus reached between the residence of Kegonga and Ntimaru Divisions and the Government.

Together with the Plaintiff was filed a Chamber Application under **Order 39 rules 1, 2, 3 and Order 1 rules 8(1), (2) and (3)** of the **Civil Procedures Rules** and **section 3A of the Civil Procedure Act** seeking a temporary injunction to restrain the defendants, their agents, servants or anybody claiming to act on their behalf or through them from constructing the residence of the Kuria District Commissioner at Kegonga Market pending the hearing and the determination of this court. Also sought was an order restraining the Defendants from utilizing money belonging to Kuria Constituency Development Fund to finance the construction of the residence or the headquarters of the whole District until this suit is heard and determined.

The 2nd, 3rd, 8th and 18th Defendants filed a Defence in which they denied the allegations by the Plaintiffs. Their case was that the residents of Kegonga and Ntimaru have agreed and settled on Kegonga Market as the headquarters and also as residence of their District Commissioner. It was resolved that the funds of the Kuria Constituency Development Fund be utilized to construct the same. This information was deponed to in the Replying Affidavit sworn by 8th Defendant **Paul Magige Kabaka** on authority of the other Defendants. They annexed various minutes of meetings of leaders and residents of Kuria East District who resolved on the new headquarters and the application of the above funds to construct it and the residence. However, 2nd Defendant **Susan Sawi Marwa** subsequently swore a Replying Affidavit taking the position that she was not opposed to the application and denounced the earlier Affidavit by the 8th Defendant.

During the application the 2nd and 18th Defendants supported the Plaintiffs. **Mr. Amuga** appeared for the Plaintiffs, **Mr. Mogire** for 2nd and 18th Defendants and **Mr. Oguttu** for the 1st, 3rd to 17th Defendants. **Mr. Amuga** filed skeleton submissions and the defence filed a list of authorities.

This being an application for temporary injunction, the court will bear in mind the principles to be applied. The case of **Giella v Cassman Brown and Company Ltd [1973] EA 358** refers. The Plaintiffs must demonstrate a *prima facie* case with chances of success, irreparable injury or loss that cannot be compensated in damages, and balance of convenience if court is in doubt.

Mr. Oguttu submitted that the suit filed by the Plaintiffs was fatally defective and that it should be struck out with costs. He relied on **Order 1 rule 8** to say that this being a representative suit leave of the court was required as was direction. It was also submitted that the Plaintiffs lacked *locus standi* as the matter at hand was of public interest. It was argued that they had not demonstrated any special interest and prejudice over and above that of the rest of the residents of Kuria East District. The Plaintiffs were alive to the fact that directions under **Order 1 rule 8(2) Civil Procedure Rules** were required and that is why one of the prayers in the application was that the court directs them to give notice of the institution of

the suit to all interested persons through an advertisement in the Daily Nation. When I listened to **Mr. Amuga**, however, he argued that although the Plaintiffs had brought a representative suit, at this stage they were coming in their personal capacities. This is until directions are given. The admission by the Plaintiffs that this is a representative suit is crucial. In the Plaint, even as amended, it is clear that the suit was brought “*on behalf of themselves and other interested residents of Kuria Constituency*”.

It would appear to be settled that where there are numerous persons having the same interest in one suit and one of such persons wishes to sue, he has to do so for himself and on behalf of the others in a representative capacity as per the requirements of **Order 1 rule 8 of the Civil Procedure Rules**. It is mandatory that leave of the court has to issue before the suit is filed and the court has to make direction that notice of the institution of the suit be given to all interested parties who may thereafter apply to be joined (**Joseph Mwangi Wachira vs Sagana Town Council Nairobi High Court Civil Case No.1765 of 2000; Joseph Kariuki and others v James Aweyo Kisumu High Court Civil Case No.124 of 2003; and El Bussaidy vs Commissioner of Lands and Other [2002] 1KLR 508**). The failure on the part of the Plaintiffs to observe these requirements makes their suit fatally defective.

The other issue raised by **Mr. Oguttu** was whether this court had jurisdiction to grant the orders when the machinery provided for under the Act had not been exhausted. The position by **Mr. Amuga** was that the application of the monies of the Fund to develop the district headquarters and residence of the District Commissioner contravened the Act in the sense that the two projects are supposed to be financed by the Central Government and also because the Fund was created for community projects under the overall objective of poverty reduction. He submitted that the Plaintiffs had demonstrated a *prima facie* case. It was also contented by the Plaintiffs that the National Management Committee created under the Act had queried the application of the funds given to Kuria Constituency Development Fund Committee on the projects shown above.

Under **section 52 of the Constituencies Development Fund Amendment Act No.16 of 2007** all complaints that the Plaintiffs may have against the Defendants should be forwarded to the Constituencies Development Fund Board for resolution. Where there is no resolution or the Plaintiffs are dissatisfied with decision the matter should be referred to the Minister responsible to set up an arbitration panel to consider and determine it before the same is referred to court. Before that machinery had been exhausted, I find, the court lacks jurisdiction to entertain the dispute.

I further agree with **Mr. Oguttu** that if the Plaintiffs feel that the Kuria Constituency Development Fund Committee acted in excess of jurisdiction by applying the funds granted to it by the Board towards the development of the projects above then they should have invoked the court’s judicial review powers for the validity and legality of the statutory duties of the Committee to be questioned. It also appears from section 52(3) of the Act that 1st to 14th Defendants are not amenable to proceedings in their personal capacities.

In short, on the material before me, and after considering the submissions, I am unable to find that the Plaintiffs have demonstrated a *prima facie* case. In view of the finding that the Plaintiffs are not properly before the court, it would be a futile exercise to consider the other principles for the granting of an injunction. The application is hereby dismissed with costs.

DATED at KISII this 26th Day of May, 2009

A. O. MUCHELULE

JUDGE

26/5/2009

A. O. Muchelule, J.

cc. Mongare

Mr. Nyasimi for Mr. Kerario for the Respondents.

Parties present.

Court: Ruling Delivered in open Court.

A. O. MUCHELULE

JUDGE